IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 700 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LILADHARBHAI DEVRAJBHAI

Versus

ARVINDBHAI KHIMJIBHAI

Appearance:

1. Civil Revision Application No. 700 of 2001

MR YN RAVANI for Petitioner No. 1-3

MR RC KAKKAD for Respondent No. 1-3

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 16/07/2001

ORAL JUDGEMENT

Heard Mr. Y.N.Ravani learned advocate for the petitioners and Mr. R.C.Kakkad learned advocate for the respondents.

2. The petitioners have challenged the order dated 18.6.2001 passed by learned 2nd Extra Assistant Judge, Junagadh in the proceedings of Civil Misc. Appeal No. 15 of 2001.

That vide impugned order, the lower Appellate Court has set aside the order passed below Exh.46 by learned Civil Judge (S.D.), Junagadh dated 20.2.2001 in the proceedings of Regular Civil Suit No. 718 of 1999.

3. The present petitioners are the original plaintiffs of Regular Civil Suit No. 718 of 1999 and the respondents are the original defendants of the said suit which was filed in the court of learned Civil Judge (S.D.), Junagadh with a prayer for perpetual injunction restraining the defendants from causing any obstruction on the road used by the petitioners / plaintiffs to reach Survey No. 148 from the road of Mendarda-Alindra to Barwala. That along with the said suit, petitioners / plaintiffs moved application Exh.5 claiming temporary injunction in terms of prayer made in the suit and it appears from the record that vide order date 31.1.2000 the 2nd Joint Civil Judge (J.D.), Junagadh granted interim injunction restraining respondents / defendants from causing any obstruction to the petitioners / plaintiffs from passing to and fro on the road used by the petitioners / plaintiffs to reach the field from the road leading to Barwala.

It may also be noted that present respondents being aggrieved by the said order of injunction, preferred Civil Misc. Appeal No. 11 of 2001 in the District Court and vide order dated 9.2.2001, the said appeal was dismissed, against which respondents preferred Civil Revision Application No. 278 of 2000 in this Hon'ble Court which was withdrawn by the respondents. It may also be noted that respondents also preferred a Review Application No. 1 of 2000 to review the order passed below Exh.5 which was also rejected.

4. It appears that pending the said proceedings, the present petitioners moved application Exh.46 in the proceedings of Regular Civil Suit No. 718 of 1999 pending before the Court of 2nd Joint Civil Judge (J.D.), Junagadh contending that despite the order of interim injunction below Exh.5, respondents / defendants in breach of the said injunction are causing obstruction on the road by raising barbed wire fencing and thereby, prayed relief to take appropriate action for willful disobedience of injunction and have prayed appropriate relief to remove the said obstruction.

That vide order dated 20.2.2001, learned 2nd Joint Civil Judge (J.D.), Junagadh partly allowed the application and directed the respondents / defendants to remove barbed wire fencing at their costs within a period of one month from the date of the order. That the respondents / defendants preferred Civil Misc. Appeal No. 15 of 2001 against the said order and learned 2nd Extra Assistant Judge, Junagadh vide impugned order allowed the appeal and set aside the said order. That the petitioners have challenged the said order of lower Appellate Court in the present civil revision application.

That vide earlier order dated 24.7.2001, rule was issued and interim relief in terms of para.8(B) was granted, against which the present respondents have preferred Civil Misc. Application No. 7274 of 2001 for vacating the interim relief and as such, present revision application is taken up for final hearing.

5. It has been urged at Bar on behalf of respondents that petitioners as plaintiffs of Regular Civil Suit No. 718 of 1999 have not disclosed the facts about the existence of barbed wire fencing on the disputed road and have prayed interim relief of injunction against any obstruction to use the said road for passing from the road of Alindra to Barwala to reach their field bearing Survey No. 148. That, however, according to Inspection Note prepared by the Court Commissioner, the barbed wire fencing was in existence on the date of filing of the suit. That the, petitioners / plaintiffs having failed to pray for a mandatory order to remove such wire fencing, have suppressed the said fact in the application Exh.46 and have obtained the order directing the respondents to remove said barbed wire fencing within a period of one month and thereby, lower Appellate Court has rightly set aside the said order.

6. That the submission urged at bar on behalf of respondents / defendants could not be accepted for more than one reasons. It would be pertinent to note that according to petitioners / plaintiffs the disputed road leading from Alindra- Barwala to the field of the petitioners / plaintiffs bearing Survey No. 148 is passing through Survey Nos. 147 and 97 owned by respondents / defendants. That prior to filing of the suit, present petitioners / plaintiffs approached the court of Mamlatdar for removal of obstruction on the road. That in the order below Exh.5 the court of 2nd Joint Civil Judge (J.D.), Junagadh has observed that

respondents / defendants have never contended existence of barbed wire fencing in the written statement and reply filed to Exh.5. That in the written statement, respondents / defendants have denied the right of way as claimed by the petitioners / plaintiffs passing through Survey Nos. 147 and 97 to reach Survey No. 148 from Alindra-Barwala road. However, the Court has given a finding of fact on perusal of report of Court Commissioner that there is a cart road passing through Survey Nos. 147 and 97 owned by respondents / defendants going towards Survey No.148 and further. That barbed wire fencing was on the part of Survey No.147 and there was no other way to reach Survey No.148 of petitioners / plaintiffs from Alindra-Barwala road as alleged in the written statement as well as reply to Exh.5 by respondents / defendants. On the basis of said finding of fact, the court of Civil Judge (J.D.), Junagadh ordered the respondents / defendants not to cause any obstruction on the cart road and to prevent the petitioners / plaintiffs using the said road from passing over it to reach the field bearing Survey No.148 from Alindra-Barwala road.

That the respondents / defendants challenged the said order by filing appeal before the District Court, Junagadh. However, the District Court , Junagadh has also not believed the factum of existing barbed wire fencing on the said road so that petitioners / plaintiffs or any person could not pass from Alindra-Barwala road to reach the field bearing Survey No.148 and on the basis of finding of fact that existence of cart road is apparent from report of Court Commissioner, the District Court, Junagadh has rejected the said appeal. Against the order of said rejection, revision application was preferred by the respondents / defendants in this Hon'ble Court which was withdrawn and review application was filed which was also rejected.

7. It appears that in the memo of appeal, the respondents / defendants have clearly stated that barbed wire fencing was already removed by them in compliance of the order of the Trial Court. Thus, it is clear from the said fact that subsequent to withdrawal of revision application, barbed wire fencing was raised by respondents / defendants on the road causing obstruction to the petitioners / plaintiffs from passing on the road to reach field bearing Survey No. 148 and thereby, petitioners / plaintiffs were constrained to move application Exh.46. That the Trial Court vide impugned order allowed the said application, but took a lenient view and did not pass any order against the respondents /

defendants for wilful disobedience of the injunction order. However, directed the respondents / defendants to remove said barbed wire fencing within a period of one month.

8. That the Trial Court vide order dated 28.2.2001 reiterated the finding that cart road is in existence between Survey Nos. 147 and 97 owned by respondents / defendants which is leading to Survey no.148 of the petitioners / plaintiffs from the road of Alindra-Barwala. That Trial Court also reiterated the finding of the fact that there is no other alternative way leading from the said road of Alindra-Barwala to reach Survey No. 148 of the petitioners / plaintiffs from the southern side in consideration of report of Court Commissioner. The Trial Court also observed that claim of the petitioners / plaintiffs to use the disputed road by way of easement right could be finally decided by recording evidence and as road is existing on the boundary lines of field bearing Survey No.147 and Survey No.97 of respondents / defendants, the passage on behalf of petitioners / plaintiffs from the said road is not likely to cause any damage or prejudice to the respondents / defendants and hence balance of convenience is in favour of petitioners / plaintiffs. As against that, if petitioners / plaintiffs are prevented from using the said road, petitioners / plaintiffs would be suffering greater hardship as there is no alternative road and thereby, has passed the order directing the respondents / defendants to remove the barbed wire fencing at their costs within a period of one month from the date of the order.

9. The submission urged on behalf of respondents / defendants that in absence of prayer for mandatory order, court cannot direct the respondents / defendants to remove barbed wire fencing has no substance in view of the fact that earlier order of injunction dated 31.1.2001 passed by learned 2nd Joint Civil Judge (J.D.), Junagadh below Exh.5 in Regular Civil Suit No. 718 of 1999 is in terms of restraining respondents / defendants from causing any obstruction or preventing the petitioners / plaintiffs or any person on behalf of petitioners / plaintiffs from using the road passed through Survey Nos. 147 and 97 from Alindra-Barwala road to reach Survey No.148. That raising of barbed wire fencing amounts to obstruction in breach of the said order. That application Exh.46 was moved by petitioners / plaintiffs under Section 151 as well as under Order 39 Rules 2 (A) and thereby, Court has passed the order in exercise of power under Section 151 as well as Order 39 Rule 2(A) of

the Civil Procedure Code. Furthermore, Section 94 of the Civil Procedure Code confer power on the Court to make such interlocutory orders as may appear to the Court to be just and proper in order to prevent the ends of justice from being defeated. Thus, order passed below Exh.46 dated 28.2.2001 by learned 2nd Joint Civil Judge (J.D.), Junagadh in Regular Civil Suit No. 718 of 1999 cannot be said to be unjust, improper or unreasonable.

That lower Appellate Court appears to have taken a perverse approach and though lengthy order of 15 pages is passed, nowhere the lower Appellate Court has appreciated the finding of facts in respect to existence of road as given by Trial Court is discussed. The reasons assigned by the lower Appellate Court are totally irrelevant to the dispute involved in the matter and as such, the order of lower Appellate Court being in illegal exercise of jurisdiction cannot be sustained in law and has to be set aside in exercise of revisional powers of this Court.

10. On the basis of foregoing discussion, revision application is allowed. The order of lower Appellate court dated 18.6.2001 passed by 2nd Extra Assistant Judge, Junagadh in the proceedings of Civil Misc. Application No. 15 of 2001 is hereby quashed and set aside. The Trial Court is directed to expedite the proceedings of Regular Civil Suit No. 718 of 1999 and to dispose of the same as early as possible. Rule to that extent made absolute.

At this stage, Mr. R.C.Kakkad learned advocate for the respondents has requested to stay the operation of this order so as to challenge the same before the Higher Forum. In the facts and circumstances of the case and as the Trial court is directed to expedite the proceedings of the suit, it would not be just and proper to stay the operation of this order. Hence, request is rejected.

(A.K.Trivedi,J.)
(vipul)